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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 573 OF 1995

Namdeo Mali,
R/o. Bhingare,
Tal. Yeola,
Dist. Nashik. ...Appellant.

Vs.

1. Jayram Barde,

2. Mr. Trimbak Ukaram Barde,

3. Mrs. Roshmabai Trimbak Barde,
All R/o. Khodlejunge,
Tal. Niphad,
Dist. Nashik.
...Respondents.

Mr. Hemant Ghadigaonkar i/by Mr. Madhav Jamadar for the appellant.

Ms. Seema Sarnaik for the respondents.

CORAM : ANOOP V. MOHTA,J.

DATED : 17th December, 2007

JUDGMENT:-

1. Being aggrieved and affected by the impugned order dated 27th April, 1993 passed by the 4th Additional District Judge, Nashik (for short, "the Trial Court"), the appellant’s application for grant of probate in pursuance to the later registered Will executed by the deceased Zipru Punja Bhil of village Bhingare, Tq. Yeola, District Nashik, dated 01/09/1990 rejected and by the same order the counter claim of the respondents

(original opponents) have been allowed and that resulted into the grant of probate based upon the registered Will of the deceased dated 05/06/1979 (the 1979 Will) and the Court has accordingly issued probate in favour of original opponent Nos. 1 to 3 (respondents 1 to 3). Therefore the present appeal.

2. On 05/06/1979, the deceased Zipru Punja Bhil executed a Will dated 05/06/1979 in favour of respondent Nos. 1 to 3 and bequeathed property bearing Gat No.7 admeasuring 2H S R situate at Village Bhingare, Taluka - Yeola, District-Nashik.

3. On 01/09/1990, it is the case of the appellant that deceased Zipru Punja Bhil, executed a Will dated 01/09/1990 in his favour.

4. On 05/01/1991, therefore, the appellant preferred a Civil Miscellaneous Application No. 8 of 1991 for probate.

5. On 10/09/1991 a Counter claim filed by respondent Nos. 1 to 3 for the probate of the Will dated 05/06/1979.

6. The appellant did not file any response and or opposition to the said counter claim. Therefore, the counter claim as raised and filed by the respondents remained unchallenged. The appellant has led the evidence of himself and one P.W.2 Mr. Popat Chandrakant Kahar an attesting witness and also Mr. Gopal Dattatraya Kulkarni, P.W.3 scribe.

7. Respondent/opponent No.1 led the evidence of himself (Mr.Jayram Barde) and one Mr.Vishwanath Sadashiv Gade, P.W. 2 who is a police patil, P.W.3 Mr. Nivrutti Gabaji Savle is an attesting witness to the Will dated 05/06/1979.

8. After considering the rival contention of the pleadings the trial Court has framed following two issues:-

1. Whether the applicant is entitled for probate in pursuance of the will dated 01/09/1990?

. No.

2. Whether the opponent Nos. 1 to 3 are entitled for probate in pursuance of the will dated 05/06/1979?

. Yes.

. and passed the order accordingly.

9. In the result, by the impugned order, the trial Court has granted probate in pursuance to the Will dated 05/06/1979 in favour of respondent Nos. 1 to 3.

10. In the year 1995, the appellant preferred a First Appeal No. 573 of 1995 before this High Court challenging the judgment and order dated 27/04/1993 passed in Civil Miscellaneous Application No. 8 of 1991.

11. On 19/07/2006, the Single Judge of the High Court by his order dated 19/07/2006 in Civil Application No. 2706 of 2006 in First Appeal No. 573 of 1995 directed respondent No.1 (i.e. the appellant in the First Appeal No. 573 of 1995) not to create any third party interests in respect of the suit property till final disposal of the Appeal.

12. Admittedly, the respondents counter-claim based upon the 1979 Will remained unopposed. In this way, therefore, admittedly, there was no objection of any kind even of the jurisdiction.

13. Order 8 Rule 6(A) to 6(G) of the Code of Civil

Procedure (for short, "CPC") amended on 1st February, 1977, being relevant, are reproduced as under:-

"6A. (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

. Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

. (2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

. (3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

. (4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

6B. Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

6C. Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation

to the counter-claim, apply to the Court for an order that such counter-claim may be excluded and the Court may, on the hearing of such application, make such order as it thinks fit.

6D. If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

6E. If the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.

6F. Where in any suit a set-off or counter-claim is established as a defence against the plaintiff's claim, and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

6G. The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim."

14. The Bombay High Court in **Teofilo Barreto Vs. Sadashiva G. Nasnodkar, 2007(6) M.L.J. 127** has exhaustively dealt with the importance of counter-claim in the following words, after taking note of various judgments including **Jag Mohan Chawla Vs. Dera Radha Swami Satsang and Ors. AIR 1996 S.C. 2222.**

"Emerging Principles:-

35-36. From the above decisions, the following principles emerge:-

. A counter-claim is really a suit, though the same is taken in the written statement. Just as a suit is filed by the plaintiff, defendant seeks a relief against the plaintiff on a cause of action which he has against the plaintiff. It is an independent cause of action which could also be agitated in a separate suit. It is to avoid multiplicity of proceedings, defendant is given liberty to file a counter-claim and get adjudication. Issues are suggested in both the original claim as well as in the counter-claim, and both are disposed of by a common judgment. Order 8, Rule 6-A (2), Civil Procedure Code says that there can be a final judgment in the same suit, both on the original claim and counter-claim. In common parlance, "common judgment" means, 'decision arrived simultaneously in more than one suit tried together'. In view of the legal position under Order 8, Rule-A, Civil Procedure Code; a counter-claim or set off can be made in many forms in a suit. But they need not be given separate numbers. The counter-claim could also said to be a weapon of evidence and enables the defendant to enforce the claim against the plaintiff as effectively as an independent action. As stated earlier, it is an enabling provision which has given a right to the defendant that instead of filing an independent action, he can seek that relief in a suit filed by plaintiff against him. Originally, there was a doubt whether the counter-claim could only be filed in a suit for recovery of money and whether there should be nexus to the cause of action on which the suit is instituted. However, the legal position is now settled in view of the judgment of the Supreme Court in the case of Shri Jag Mohan Chawla Vs. Dera Radha Swami Satsang, 1996 DGLS 896; 1996(5) JT SC 428 wherein their Lordships have held thus:-

. ".... The counter-claim could be treated as a cross suit and it could be decided in the same suit without relegating the parties to a fresh suit."

37. The aforesaid decision has been subsequently followed by this Court in the decision reported in 1996(2) Mh.L.J. 844, Hemraj Vs. Yamunabai. From the above judgment of the Supreme Court it is clear that the scope of a counter-claim is in the nature of a cross suit for all purposes.

38. Upshot of the above emerging principles is that the counter-claim has to be treated as a separate suit. Only for the purpose of convenience and speedy disposal of rival claims, counter-claim in a suit is made permissible."

15. Therefore, the learned counsel appearing for the respondents basically contended that; such counter-claim as raised, has been answered based upon the material evidence laid by the parties without any objection about the jurisdiction at any point of time therefore, the issue cannot be allowed to raise on the ground of maintainability and or jurisdiction for the first time in the first appeal; any defendant/ respondent can raise counter-claim in any kind of suit; there is no bar whatsoever, which prohibit and or debar the respondents from raising any counter-claim in any proceedings and even in the

probate proceedings like present one.

16. After reading the clear provisions of counter-claim, I am also of the view that there is no embargo of whatsoever created to raise counter-claim in the suit and or proceedings/ application filed under the Indian Succession Act-1925 (for short," the Indian Succession Act"). There is nothing to show that the counter-claim as provided under Order 8 Rule 6A is limited to the case involved in the money claims only. The Rules 6A to 6G if read together, no restriction whatsoever, is created to file counter-claim in any suit and or proceedings of any nature, vide **Suman Kumar Vs. St. Thomas School and Hostel and ors. AIR 1988, Punjab and Haryana 38.** In **Raman Sukumaran Vs. Velayudhan Madhavan, AIR 1982 Kerala 253**, the Kerala High Court held that in view of Rule 6A any counter claims, which arise between the parties and which are cognizable by the Court where the suit is pending, falls within the purview of Rule 6A to 6G of the CPC. The object appears to be to reduce pendency of cases so that cause of action and cross-claim similar in nature could be clubbed together and disposed of by a common judgment. The reliance can also be made in this regard on **Laxmidas Dayabhai Kabrawala Vs.**

Nanabhai Chunilal Kabrawala & Ors. AIR 1964 S.C. 11, wherein though there was no such amended provisions like order 8 Rule 6A to 6G, the Supreme Court still has recognized and permitted the counter-claim.

17. These amended Rules are with the view to make detail provisions regarding such counter claims.

18. The Apex Court in **Jag Mohan Chawla (supra) and also in Mahendra Kumar Vs. State of Madhya Pradesh, AIR 1987 S.C. 1395** held that in a suit for injunction, counter-claim for injunction in respect of the same or a different property is maintainable. The cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff.

19. As per Rule 6-E, if the plaintiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce the judgment against the plaintiff in relation to the counter-claim made against him and or pass another order. As per Rule 6-G, the rules relating to a written statement by a defendant shall apply to the written statement filed in answer to a counter-claim.

20. As per the Bombay Amended Rules (Bombay rules) (Maharashtra Government Gazette dated 31/12/1987) 19, 20 and 21 as noted above, the court can proceed for want of written statement by the plaintiff to the counter-claim raised by the defendant in the suit. As per Rule 20, if in any case, in which the defendants sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed the counter-claim may nevertheless be proceeded with. Rule 36 of the Bombay rules deals with the provisions with regard to the third party in the counter-claim. In totality, therefore, considering the above scheme and the purpose and object of the amendment to Order 8 Rule 6A to 6G including the Bombay rules 11 to 36 of C.P.C. as referred above, I am of the view that such counter-claim for probate based upon another Will as filed by the defendant/ respondent herein in the testamentary suit in absence of any bar in any of the Act is maintainable.

21. The entire CPC is applicable to the testamentary suit. **(Vide Rupali Mehta Vs. Smt. Tina Narinder Sain Mehta 2006(6) ALL MR Page 48)**.

22. The procedure and the proceedings for grant of probate are available in Indian Succession Act. The Gujrat High Court in **Multivahuji w/o Goswami Goverdhaneshji Girdharlalji Vs. Smt. Kalindivahuji & Ors. AIR 1994 Gujarat 42,** has explained this in following words.

> "13. It is now well established general observation that the probate granted by a competent Court is conclusive evidence of the validity of such will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. Where the citation has been issued to the interested persons and has been issued to the interested persons and has been served upon them, their failure to enter a caveat to contest the proceedings would preclude them from contesting the validity of the will in every proceedings. (see Smt. Rukmini Devy V. Narendra Lal Gupta, AIR 1984 Supreme Court 1888).
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> 14. A probate Court is a Court of conscience and it does not decide the rights between the parties. A Probate Court has to deliver a judgment which would become a judgment in rem and this judgment will bind not only the parties before it but the whole world. In the case of Kalyanchand Lalchand V. Sitabai Dhanasa, reported in AIR 1914 Bombay 8 a Full Bench of the Bombay High Court has held that contentious probate proceedings being required to be in the form of suits under S. 295 of the Act, constitute 'suits' under S. 11 of the Code of Civil Procedure and a finding by a Probate Court in such proceedings operated as res-judicata under S. 11 as between the parties thereto. The probate proceedings

must take the form as nearly as may be of a suit accordingly to the provisions of the Civil Procedure Code, in which the petitioner for probate or letters of Administration shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant. There is no definition of the word "suit" either in the Civil Procedure Code or in the General Clauses Act and, therefore, the Full Bench held that contentious probate proceedings must take the form of a suit. A judgment as a rule affects only the parties thereto and their privies. Judgments is rem form an exception to this rule and are valid not only inter partes but against all the world. Ss. 40 to 44 of the Evidence Act deal with the relevancy of judgments of courts of justice. S. 41 deals with final judgments, decrees or orders of competent courts in the exercise of probate, matrimonial adminaralty or insolvency jurisdiction or what are known as judgments in rem and in states that such judgments, decrees or orders are conclusive proof of the matters specified in the Section and by S. 4 of the Evidence Act, evidence cannot be allowed to disprove the facts established by such judgments.

15. Section 276 of the Act provides that an application for probate or for letters of administration shall be made with the will and it shall contain the details set out in Clauses ’a’ to ’e’. Under S. 280 such petition is required to be signed and verified by the petitioner. Under S. 281 of the Act, the petition for probate is also required to be verified by at least one of the witnesses to the will. Section 283 of the Act deals with the powers of the District Judge, which include the power to examine the petitioner in person upon oath or to require further evidence of the due execution of the will and he can issue citations calling upon all the persons claiming to have any interest in the

> estate of the deceased to come and see the proceedings before the grant of probate. The person objecting to the grant of probate has right under S. 284 to lodge caveat against the grant of probate. Once the caveat is entered to the grant of probate, it becomes incumbent upon the court to hear such caveator and a District Judge or his delegate shall not grant probate in which there is contention as to the grant.

23. In the Case of **Chiranjilal Shrilal Goanka V. Jasjit Singh, reported in 1993(2) SCC 507 : (1993 AIR SCW 1439)** the Supreme Court of India has made pertinent observations about the nature of Probate proceeding in the following words:

> . "The Succession Act is a self-contained code insofar as the question of making an application for probatee, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself."

24. It is further to be noted the following Sections 268 and 295 of the Indian Succession Act, which reads

thus:-

> . **"S. 268:- Proceedings of District Judge's Court in relation to probate and administration:-**
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> . The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908 (5 of 1908).
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> . **"S. 295:- Procedure in contentious cases:-**
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> . In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff and the person who had appeared to oppose the grant shall be the defendant."

. From the above it is clear that the probate proceedings shall be regulated by the CPC.

25. The proceedings for the grant of probate or letters of administration takes the form of a suit in any case where the contentions are raised about the capacity of the testator and about the facts whether he was in sound and disposing state of mind, when he made a Will which was duly executed and or attested,

such proceedings becomes contentious. Once the proceedings becomes contentious, Section 295 provides that it shall take, as nearly as may be, the form of a regular suit. The words "as nearly as may be" therefore, further made clear that as far as possible such proceedings is to be treated as suit governed by the C.P.C..

26. There is no dispute in the present case that the Indian Succession Act, is applicable to the facts and circumstances of the case. The parties have in fact acted accordingly. The Court has also passed an order based on the said provisions after considering the rival contentions as raised by the parties in support of respective wills, based upon the evidence laid by the parties. As there was no objection of any kind raised by the defendant with regard to maintainability of counter-claim as filed in the present proceedings.

27. The submission, therefore, based upon **Venidas Nemchand Vs. Bai Champabai, Bom. L.R., Volumn XXXI 1928 page 1014**, that it is obligatory to probate the Will by a separate petition, in view of above change of law and the circumstances, is not acceptable. This Court while dealing with the Bombay High Court Rules

602 and the Indian Succession Act Section 295 based upon the rival Wills set up by the caveator held that the petition for a probate of a Will, on another will of the testator should be propounded by a separate petition. Admittedly, at that time there was no such provisions of the CPC as referred with regard to the above counter-claim. Therefore, in view of the existing provisions of the counter-claim and in view of the fact that the defendants to the counter-claim never raised any objection to the said procedure adopted by the parties as well as by the Court and in fact participated in the same by leading evidence to that effect for the will in his favour and against the will placed on record by the original defendant. Therefore, in the facts and circumstances of the case, without going further into the merits of the detail procedure under the Indian Succession Act, I am of the view that the impugned order as passed, cannot be said to be without jurisdiction or bad in law on the ground that the defendants failed to file or propound such Will by a separate petition.

28. Therefore, the judgment in **Venidas** (supra), in the facts and circumstances of the case and in view of the available provisions of counter-claim in C.P.C.

is not applicable. The same is the effect of **Smt. Usharani Roy Vs. Smt. Hemlata Roy W/o. Hemendra Kumar, AIR (33) 1946, Calcutta 40** as relied by the learned counsel appearing for the respondent in support of his case that the obligatory on the part of caveator to file a separate petition to propound the will set up by him. It is relevant to note that the Calcutta High Court in **Smt.Usharani** (supra) itself observed that there may be exceptional circumstances where this procedure cannot be followed. Both these two judgments are noted based upon of then existing provisions of CPC where there was no provisions for the counter-claim as now available in the CPC as referred above i.e. Order 8 Rule 6A to 6G.

29. In the present case, admittedly, apart from that no objection of any kind in reference to the absence or non service of citation as contemplated under Sections 268 and 282 of the Indian Succession Act and as the parties had full knowledge about the probate proceedings and as contested and lead evidence on all counts, therefore, there was no question of any kind of prejudice. The order, therefore, as passed after giving full opportunity to both the parties of granting probate in favour of defendant based upon the

Will cannot be said to be unjust or bad in law. As on merits, the Court found the material in favour of the defendants to support the Will filed and relied upon for the probate. Therefore, there is no case of revocation of probate as granted as the original plaintiff/appellant failed to establish any just cause or any special circumstances on merits as well as on law to reverse the finding as given and as the decree is granted in favour of the defendants.

30. Apart from the construction of the Will, the point is out of these two Wills which Will is genuine and valid as contemplated under Section 74 of the Indian Succession Act. In **Gorantla Thataiah Vs. Thotakura Venkata Subbaiah & Ors., AIR 1968 S.C. 1332,** the Supreme Court while dealing with this aspect, observed that the suspicious circumstances need to be judged in the facts and circumstances of each particular case. The burden is upon the person who takes benefit under Will to support the genuineness of the Will and further uncloud and or remove the suspicious circumstances as alleged by the other side. The another aspect with regard to prove of execution of Will has been declared in **Madhukar D. Shende Vs. Tarabai Aba Shedage, (2002) 2 S.C.C. 85,**

wherein the Supreme Court has held that there is no rule of law or evidence stipulating the presence of a Doctor at the execution of a Will as contemplated under Section 63 of the Indian Succession Act as well as Section 68 of the Evidence Act-1872.

31. In **Ramabai Padmakar Patil Vs. Rukminibai Vishnu Vekhande, AIR 2003 S.C. 3109,** the Apex Court while dealing with the genuineness of a Will wherein the testator mother gave entire property to the widowed daughter who lost her husband at very early age and thereby excluded all other daughters held, in the facts and circumstances would not cast doubt as to authenticity of the Will. The examination of only one attesting witness with no infirmity in his testimony, is sufficient to prove Will and therefore, there was no evidence adduced to show that testator was suffering from any ailment impairing her mental faculties and in the result, such Will was accepted.

32. How to prove Will has been discussed in **H. Venkatachala Iyuenagar Vs. B.N. Thimmajamma & Or., AIR 1959 S.C. 443.** The basic requirements are :-

a. Whether testator signed the will?

b. Did he understand the nature and effect of he disposition in the Will?

c. Did he put signature to the Will after reading, understanding and knowing the contents of the Will?

d. Whether requirements of Sections 59 and 63 of the Indian Succession Act and the nature of proof have been satisfied?

e. Whether propounder in cases of alleged suspicious circumstances, must remove such suspicion by adducing cogent and reliable evidence and discharge the burden accordingly?

33. In the present case, the appellants/ original applicant who was the nephew of the deceased has relied on the Will dated 01/09/1990 (Exhibit 24), (later Will), Vyavastapak Patra dated 06/12/1982, the death certificate dated 01/09/1990 and 7/12 extract of Gat No. 7 in support of his application. He examined himself and two other witnesses viz. A.W.-2 Popat

Chandrabhan Kahar, the attesting witness to the Will, and A.W.-3, Gopal Dattatraya Kulkarni, a scribe.

34. The respondent/ original opponents resisted the said Will and submitted it to be a bogus and false and filed the counter-claim for granting probate in their favour in pursuance of the Will dated 05/06/1979 Exhibit 29 (first will). He examined himself and P.W. 3 Nivrutti Sabale, the attesting witness. By this Will which was executed before 11 years remained in favour of the respondent/ opponent Nos. 1 to 3 when the deceased was residing in their house since more than 13 years. Respondent/Opponent No.1 is a cousin of the deceased, opponent no.2 the brother and Opponent no.3 is wife of the brother.

35. As per the appellant who is a nephew of the deceased, the later will was executed in presence of A.W.-2, Mr. Popat Kahar, Jairam Tanaji Somase (not examined) on 01/09/1990 and it was registered in the office of Sub-Registrar on 01/09/1990 itself. Therefore, the opponent has resisted the said Will only on the ground that there were suspicious circumstances specially as the deceased was not in a fit mental condition to execute such Will as he died

on the same day. Apart from the facts of the registration of the said Will on the said date itself, the burden lies upon the appellant, propounder to remove such suspicious circumstances by adducing cogent and reliable evidence. There is nothing on record to show that the deceased was in a mental fit condition as admittedly he was unwell but was capable of executing the will; and was knowing the contents of the Will; and made it voluntarily in favour of the applicant. The applicant is the only beneficiary of the said Will. He must have taken all prominent part in getting the execution of the Will and its registration. The deceased died in the house of the applicant at village Bhingare.

36. As per the applicant, the scribe, Gopal and Sub-Registrar brought from Yeola to village Bhingare and the Will was scribed as per the say of the deceased in the presence of witnesses (A.W.2) Popat and Jairam. According to the appellant, the said Will was written and on the same Sub-Registrar obtained the thumb impression of the deceased on 01/09/1990. However, as noted rightly by the learned Judge, as P.W.2 Gopal deposed in his evidence and stated that the Will was written at Yeola.

37. According to Gopal, the Stamp paper was purchased by Zipru Punja from him. With the assistance of the learned counsel appearing for the parties, as pointed out, the stamp paper is in the name of Jairam Bapu Barde dated 27/09/1990 whereas the date of the Will as per the applicant Exhibit 24, is dated 01/09/1990. It was registered on 01/09/1990 at Yeola between 11 a.m. to 12 p.m.. There is no explanation whatsoever available with regard to the date on the Stamp i.e. 27/09/1990.

38. The deceased died at 6.00 p.m. of asthama (P.W.1). He was asthama patient. As per the applicant, they left the village Bhingre for Yeola at 8.00 a.m.. Gopal, the scriber of the Will, as noted, facing number of litigations for preparing false documents and obtaining signatures of the executors by misrepresentation. Therefore, it is difficult to accept the case of the applicant based upon the evidence of Gopal Kulkarni, the scribe, whose evidence is not trustworthy.

39. This creates doubt as regards execution of Will also for the reason that the applicant made positive

statement that the Will was scribed at Village Bhingare whereas Gopal deposed that it was written/scribed at Yeola. This contradiction is very material. There is nothing on record to show that at what time the attesting witness from Banegaon were called and further when the Sub-registrar and scribe from Yeola reached to village Bhingare.

40. There is no medical evidence to show that the deceased was in a fit condition to understand and to execute the Will at the alleged time and specially the contents of the Will. It is nowhere mentioned that it was the last Will of the executor. There is no mention about any earlier Will executed by the executor. There is also nowhere mentioned that the Will was explained and the contents were understood by the deceased.

41. As per P.W. 2, Popat Kahar, 8 days prior to his death, deceased Zipru Punja told to get something to be done. The Namdeo accompanied him to bring writer and stamp were brought from Yeola. Though supported, the applicant but without any date and or time in this regard. It is nowhere mentioned when and on which date the Will was executed at the applicant’s village

as stated by him. It is nowhere stated even by Gopal that the deceased understood the contents and or his mental condition was good. Admittedly, the deceased was suffering from Asthama and even on the date of his death.

42. In view of this, the learned Judge is right by holding that the evidence of P.W. 2 Popat who is attesting witness though corroborated the version of the applicant but in the facts and circumstances of the case, not sufficient to prove the Will beyond the reasonable doubt and also in view of the contradictory evidence of applicant and P.W. 3, Gopal Kulkarni. All these facts and circumstances of the case, creates doubt. The applicant failed to discharge to remove these doubts and suspicious circumstances.

43. In the present facts and circumstances it was essential to examine the doctor to indicate the mental condition of the testator at the time of execution of the Will. Other witnesses specially attesting witnesses have nowhere stated that the mental condition of the deceased was good and he understood the contents of the Will as read over to him. It is necessary to prove that at the relevant point of time,

the deceased was indisposing state of mind and he understood the nature and effect of the disposition when he put his thumb impression to the document out of own free will. In the present case, there are many suspicious circumstances surrounding the Will and as the appellant unable to remove the suspicions by cogent and satisfactory evidence, mere execution of a Will by producing scribe or attesting witness proving of genuineness of a testator's thumb impression by themselves is not sufficient to establish the validity of the Will unless suspicious circumstances, ruled out **(vide Kalyansing Vs.Smt. Chhoti, AIR 1990 S.C. 396)**. I am not satisfied in the present case that the later Will is genuine.

44. The deceased while executing the first Will of 1979 had invoked the earlier Will. Therefore, at the relevant time, the deceased was fully aware of the contents of the Will and with full knowledge had revoked the Will and executed the Will. On the contrary, in the later Will in question, there is no reference made to the earlier Will. In the first Will, the appellant- nephew is not the beneficiary. In the later Will, the appellant is only the beneficiary and not the respondent/ Opponent Nos. 1

to 3 who are the beneficiaries of the Will of 1979. The scribe of the later Will was facing the Criminal Prosecutions. His evidence, therefore, just cannot be relied upon as a foundation to accept the case of the appellant. His evidence is untrustworthy and undependable. According to Gopal Kulkarni, Scribe, the deceased Zipru Punja purchased the Stamp from him but the Stamp reflects the name of one Jayram Barde. The uncertainty about the place of the execution of the Will either at Yeola and or Bhingare creates serious doubts about the execution of the Will at Village Bhingare as contended by the appellant. It is also destroyed the case of the appellant as well as the evidence of attesting witnesses that the Will was executed at village Bhingare.

45. Normally, the presumption of genuineness arising from registration needs to be accepted. But in the present case, in view of the above, a suspicious circumstances and as the appellant fail to discharge a burden, the case of the appellant is difficult to accept.

46. In the present case, merely because a Will is registered its genuineness cannot be presumed. The

registration of a Will does not change the onus of proof from its propounder to the challenger when doubt is raised. In the present case, there is nothing further to show that the Sub-Registrar had explained the contents to the deceased. There is also nothing to show that the Sub-Registrar found the deceased in good health and mental condition and there is also nothing to show the voluntary character of the documents (**vide Rabindra Nath Mukherjee Vs. Panchanan Banerjee, AIR 1995 S.C. 1684)**.

47. The deceased by revoking the earlier will dated 05/06/1979 executed the 1979 will and got it registered also. Since then the said Will remained unrevoked till this date. On the date of Second Will i.e. 01/09/1990 itself, the deceased died without referring to the earlier Will. Therefore, when the first Will was executed, he was alive thereafter for more than 13 years. As the deceased had no issue and as wife was also died, he executed the Will in favour of the respondents i.e. cousin brother and his wife. All the three respondents are the beneficiary of the 1979 Will. There is no reference in the said Will of the appellant who is nephew of the deceased. The respondent Jayram examined himself and supported that

the deceased was residing with him prior to his death for 13 years. He was cultivating the land at village Bhingare. The Will was executed at Niphad. The Will was scribed by one Mr. Joshi and attested by the Nivrutti Ghamaji Sabale also. The deceased died at village Bhingare. The cremation of deceased was done in the presence of Jayram. The applicant Namdeo was not present at that time.

48. The Jayram, opponent further stated that the deceased had given the land for cultivation to Tabaji Sadashiv and got the land back after litigation only. He admitted that the deceased stopped cultivating the said land one year prior to his death. The deceased was residing in village Bhingare. He described the events which lead to the execution of the 1979 Will. He has stated that the scribe Mr. Joshi written the contents of the First Will at Niphad in presence of Nana Una Pawar, deceased Zipru, Nivrutti Sabale, Trambak Tukaram and Reshmabai. He further stated in the cross-examination that he gave first thumb impression then Nivrutti Sabale signed. However, he admitted that they told Zipru to give his thumb impression as a witness and obtained thumb impression. In totality, this witness has given a many details and

the background which lead to the execution of the Will which remained undisturbed and unchallenged. There was no challenge whatsoever raised at any time even by the deceased during his life time referring to the execution of the 1979 Will.

49. Vishwanath, another witness of opponent No.2 supported the case of the opponent that the deceased used to stay in Temple whenever he used to come to village Bhingare. The deceased was residing with Jayram Bapu at village Khedale. The deceased came to village Bhingare prior to 5 to 6 days before his death. At the time of cremation and or prior to that Namdeo Jangalu Mali was not there. He denied that the writer Kulkarni was brought at Bhingare and the Will was executed.

50. Nivrutti Sabale who is third witness of the opponent and attesting witness to the 1979 Will supports and corroborates the evidence of Jayram. With regard to the events which lead to the execution of the Will. He states that the said Vinayak Joshi, scriber is no more. This witness has further stated that:- "the said Vinayak Joshi had drafted the Will on say of Zipru, at that time. After writing the Will it

was read over to deceased Zipru and then he obtained the thumb impression of him on it. Jayram Bapu also put his thumb impression. Thereafter I had obtained the thumb impression on it. The document of Will which is shown to me appears my signature. The other witness Motiram Dushing village Rui was also there. He also put his signature on the said Will in my presence. The scribe Vinayak Joshi also put his signature on the Will of deed. Thereafter, we went to the office of the Sub-Registrar, Niphad. Then Zipru Punja registered the Will."

. This evidence remained undisturbed even in the cross-examination. He stated in the cross-examination that the deceased Zipru was cultivating his land till his death. He further volunteers that all had been to the office of the Sub-Registrar.

51. Taking all this into account, I am of the view that the reasoning given by the learned Court and the order as passed in favour of the opponent Nos. 1 to 3 granting probate is correct. In the result the rejection of the claim of the appellant for grant of probate is also correct.

52. There is no perversity in the order. The judgment and order is within the frame work of law and the record.

53. Resultantly, the appeal is dismissed.

(ANOOP V. MOHTA, J.)